# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1918.**

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## No. 179.

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JOHN KENNY, PETITIONER,

*vs.*

LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR OF THE ESTATE OF LAH-TAH-SAH, DECEASED OSAGE INDIAN, ROLL NO. 256.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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## SUPPLEMENTAL BRIEF FOR RESPONDENT LABAN MILES.

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Oklahoma Indians were expressly excluded from the provisions of the act of Congress of June 25, 1910, 36 Stat. L., 855 (authorizing the Secretary of the Interior to determine heirs), by the last proviso of section 2, which reads:

> *"That sections one and two of this act shall not apply to the State of Oklahoma."* (Italics ours.)

This depended upon the validity of the marriage in question. The court held the marriage valid and that the widow was an heir to the estate, and reversed the trial court on this point.

Bilby *vs.* Brown, 34 Okla., 780, was an action for partition of real estate. Alice Shields, an enrolled Creek freedman, died, leaving a husband, and two children by a former husband. The surviving husband was a non-citizen of the Creek tribe. The question was whether the lands of Alice Shields, deceased, descended to her second husband and the two children by a former husband, or whether the lands descended to the two children and the brothers and sisters of the decedent, to the exclusion of the surviving husband, and in this connection the court said:

> "The court below held that the husband and two children of Alice Shields inherited the land, each taking a one-third interest. This judgment of the trial court was correct."

Irving *vs.* Diamond, 23 Okla., 325, was an action to partition the lands allotted to a child born December, 1895, and died August, 1900. The question was whether under the acts of Congress and the laws of the Creek Nation any part of the estate descended to the father. The court said:

> "It is contended on the part of plaintiffs in error that the land in its entirety was inherited by the mother on the death of the allottee, and that on her death it was inherited by her children, and that the deed of the father conveyed no title to Diamond. This contention we believe to be correct."

Thus the ownership of the land involved was ascertained by the determination of the legal heirs of the decedent, which was contested and adjudicated in the partition suit.

Barnett *vs.* Way, 29 Okla., 780, was an action for partition and to set aside and have canceled certain invalid deeds

as clouds upon the title to the lands in question. The court said:

> "The decree of that court (the court below) disposes of the void instruments satisfactorily to all parties, but that part of the decree which determines who the heirs of Cita Barnett, a deceased Creek Indian, are, and distributes among them her allotment of land, is complained of in this proceeding."

In this case the district court determined the heirs in the partition action and an appeal was taken to the Supreme Court of Oklahoma and there affirmed.

De Graffenreid *vs.* Iowa Land & Trust Co., 20 Okla., 687, was an action to quiet title, or for partition, or for sale of the lands involved, as the respective interests of the parties might appear, involving a Creek Indian allotment. After a long review the court concludes:

> "Hence, we are of the opinion that Cynthia Tolliver is entitled to an undivided one-half interest in the allotment in controversy, and Ben Reeves, husband of Castella Brown, her surviving, the remaining one-half."

Warren *vs.* Cannard, — Okla. —, 120 Pac., 599, was an action to quiet title involving ownership and right of possession dependent upon the determination of the legal heirs of a full-blood Creek Indian. The court in part said:

> "Frank L. Warren, the plaintiff in error, as plaintiff filed his petition in the District Court of Hughes County against Felix P. Canard, defendant, alleging that he was the owner and in possession of certain real estate, that the defendant claimed an interest therein, and *praying that he have judgment quieting title.* The defendant answered, admitting that the plaintiff was in possession of the real estate, but denying that he was the owner of it, and setting up title in himself. He alleged that he was a full-blooded Creek Indian; that in 1899 he married Nancy Leader, a

full-blooded Creek; that they had one child, named Stephen; that allotments were made, both to Nancy and Stephen; that Nancy died in 1903; that Stephen died in 1908; and that the defendant, by reason of these facts, inherited both of the allotments. The plaintiff replied with a general denial and a particular denial that the defendant ever married Nancy Leader, or that he was the father of Stephen Canard, and further pleaded that Stephen Canard was the illegitimate son of Nancy Leader; that when Nancy died Stephen inherited the lands allotted to her, and when Stephen died both allotments descended to the brothers and sister of Nancy Leader, who were the maternal uncles and aunt of Stephen Canard; and that these heirs had all conveyed to the plaintiffs. *The question involved is the marriage of the defendant and Nancy Leader.* The court found that the defendant was lawfully married to Nancy Leader, as alleged by him, and that there was born to the union one child, Stephen; that Nancy died in February, 1903; that Stephen died in September, 1908; that the land in controversy at the death of Stephen descended to the defendant as father; and that the grantors of the plaintiff therefore had no right to convey the same."

In Hall *vs.* Gabbert, 213 Ill., 208, *supra*, the court said:

"The parties in interest in the land are adults. The right to partition is fixed by statute, and where the rights of minors or infants are not involved the court may not refuse to *declare* the rights of the parties claiming to be owners of the land and decree partition among them according to their rights."

In Shorton *vs.* Judd, 42 Pac., 337, the Supreme Court of Kansas said:

"This action was commenced in behalf of the child, John Judd, June 19, 1890, for the purpose of setting aside the will and for the *partition* of said real estate; one-half to be set off to him and the other half to his mother, Sadie Runkle, free and clear of the claims of any of the other parties. On June 20, 1890, Sadie

> Runkle, defendant, filed answer, alleging that the will was void and asking for *partition* of the real estate and that she be given one-half thereof." (Italics ours.)

In passing on the question of jurisdiction the court said:

> "Counsel for plaintiff in error *contend that the district court had no jurisdiction of the subject of the action* and that relief should have been sought in the probate court by way of contribution, and sections 39, 58-62 of chapter 117, Gen. St. 1889, being an act relating to wills, are cited in support of this position. It is our opinion, however, that where relief is sought only as to real estate, and no part thereof has been sold for the payment of debts, and no division has been made, an heir may have specific relief as to the property itself and need not pursue the *circuitous* remedy of contribution in the probate court." (Italics ours.)

In *Hill vs. Reno et al.*, 112 Ill., 154, the Supreme Court of Illinois said:

> "Where a case is fairly brought within the law authorizing a *partition, the right to partition is imperative and absolutely binding upon courts of equity.* They are not clothed with such discretion as that, under a given state of facts, they may grant the relief or refuse it and yet commit no error. *To invoke this equitable remedy is a matter of right and not of mere grace.* (Italics ours.)

In *O'Keefe vs. Behrens*, 71 Kan., 469; 85 Pac., 555; 8 L. R. A. (N. S.), 354, the Supreme Court of Kansas said:

> "Immediately upon the death of the ancestor, title to his real estate descends to his heirs, subject only to appropriation for the payment of debts. *Black vs. Elliott*, 63 Kan., 211, 215; 88 Am. St. Rep., 239; 65 Pac., 215. *They are entitled to possession, and may require partition at once. Letters of administration may not be taken out for a long period of*

*time or not at all.* Much time may elapse before claims are presented or established, or before it may be known that the personal assets are insufficient. During such periods they are entitled to the separate enjoyment of their several portions of the estate and may proceed to enforce their rights unless some special state of facts should make it unjust or improper that they should do so. General creditors are not proper parties to partition proceedings at all, and the administrator should not be joined unless under exceptional circumstances. *Sheehan vs. Allen*, 67 Kan., 712; 74 Pac., 245. If, after partition, the administrator should require the land or some portion of it for the payment of debts, it may then be sold. *Sample vs. Sample*, 34 Kan., 73, 77; 8 Pac., 248. Therefore *it was not necessary that the heirs, as a condition of recovery, should either plead or prove that the decedent's estate had been settled* or that no debts existed for the payment of which the land might afterwards be appropriated. (Italics ours.)

"The granting to courts of probate of authority to partition the lands of decedents is not of itself a withdrawal of such authority from courts of chancery proceeding in suits brought by a tenant in common of such property. The jurisdiction of the two courts is concurrent. *Wilkison vs. Stuart*, 72 Ala., 198."

See cases cited at page 14 of our original brief, where the Federal Supreme Court affirmed decisions of District and Supreme Courts of Oklahoma, where Indian heirs were determined in actions to quiet title, actions in ejectment, and actions to determine heirs.

The action in the District Court of Osage County, Okla., in which the judgment pleaded in the case at bar as *res adjudicata* (printed R., pp. 15-17, "Exhibit A") was rendered, was an action for partition on the part of the plaintiff and an action to *quiet title* on the cross-petition of the defendant, John Kenny, on the questions he there raised and put in issue by his cross-petition. The court had jurisdiction to render a judgment quieting the title to the lands in Kenny on his cross-petition, irrespective as to whether the lands

were restricted or unrestricted. Suppose such a judgment had been rendered in Kenny's favor, such a judgment would not have been subject to the approval of the Secretary of the Interior, because no supervision whatever is given the Secretary in actions to quiet title. Miles's only remedy would have been his right of appeal. Likewise, when Kenny's claim as the sole heir set up in his cross-petition to quiet title in him was denied and he was awarded a one-half interest only, his only remedy was by appeal, and not having appealed therefrom it became final when the six months' period allowed for an appeal expired.

In Adkins *vs.* Arnold, 235 U. S., 417, the court said:

> "Under section 16, of the Creek Indian Allotment Act of June 30, 1902, c. 1323, 32 Stat., 500, only allotments to living members of the tribe in their own right were subject to restrictions upon alienation. Allotments on behalf of deceased members were left unrestricted."

To hold the lands involved in the case at bar to be restricted would be inconsistent with the holdings in the following cases:

Levindale Lead & Zinc Mining Co. *vs.* Coleman, 241 U. S., 432; Mullen *vs.* United States, 224 U. S., 448; Skenton *vs.* Dill, 235 U. S., 206; Sizemore *vs.* Brady, 235 U. S., 441; Woodward *vs.* De Graffenreid, 238 U. S., 284; and Adkins *vs.* Arnold, 235 U. S., 417.

The petitioner, in his brief at page 19, seemingly contends for a construction of section 7 of act of June 28, 1906, different from the construction placed thereon by this court in the Levindale case, *supra*, where the court said:

> "Emphasis is placed by the defendant in error on the provisions of section 7 as to leases; but it would be an inadmissible construction of this section to say that the word 'heirs' was there used in contradistinction to 'members.' This provision as to leases, in the

> light of the purpose of the act, had reference, we think, to the 'individual member' *who received allotments* and the Indian heirs of *such* members." (Italics ours.)

In other words, section 7 applies only to cases where restrictions have attached by reason of allotments of land allotted and deeded to a member of the tribe during his lifetime, and leases thereafter made by the original allottee, or in case of his death after receiving such restricted allotment, leases made thereon by his Indian heirs.

We call attention to the statement of this court in the Mullen case, *supra,* that:

> "No distinction is made between the heirs; they might or might not be members of the tribe and where there were a number of heirs, each would take his undivided share."

In the decision complained of, the Supreme Court of Oklahoma holds the same view and emphasizes the fact that no distinction has been made between heirs. The lands descend to all heirs alike, unless there is an express provision to the contrary, and there is none. The lands involved in the case at bar and the lands involved in the Levindale case, *supra,* descended to the heirs under the provisions of section 6 of the Osage act, *supra,* which provides:

> "That the lands, moneys, and mineral interests, herein provided for, of any *deceased* member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

In the Levindale case, *supra*, this court held that lands inherited by a white heir prior to their actual allotment to a member of the tribe entitled thereto at the time of death, that such lands descended to such white heir unrestricted. It therefore follows that as no distinction has been made between heirs, and that they may or may not be members of the tribe, and there being no express provision to the contrary, that such lands descend to any and all the heirs free from restrictions. No restrictions have been imposed upon inherited lands, as such, but only upon lands segregated, allotted, and deeded either as "homestead" or "surplus land." Lands could not thus be segregated and "come under the stated restrictions" until after the approval of the schedule of tentative allotments was approved by the Secretary, the first of which was November 19, 1908, three months after the death of Lah-tah-sah. She died before a segregation as to "homestead" and "surplus" could be made.

It is stated in the answer of petitioner filed in the county court (printed R., 20) that the Secretary of the Interior refused and failed to approve the judgment and proceedings of the district court. This is misleading. It implies that same were submitted to the Secretary and that he either refused or failed to approve same. Such was not the case, as the same has never been submitted for approval. When a sale of the lands are had under the order of the court the deeds will be submitted for approval, should it be eventually held that the lands are restricted.

The corrected and final opinion of the Supreme Court of Oklahoma is printed in the record, beginning at page 195. The opinion is elaborate and well reasoned and should be affirmed.

The judgment rendered by the district court in the partition suit, pleaded as *res adjudicata*, is printed in the record as "Exhibit A", pages 15-17.

The printed record shows (pp. 153-4) that respondent, John L. Bird, filed his resignation as administrator in the

county court on December 31, 1914; that on March 22 (p. 158), a petition for the appointment of W. O. Dildine as administrator of the estate was filed; that on May 20, 1915 (R., 160-161), an order discharging respondent, John L. Bird, and appointing W. O. Dildine administrator was made and entered; that letters of administration were issued to W. O. Dildine May 20, 1915 (R., 162), and that he qualified on the same day by giving bond (R., 163-4). The appeal was not filed in the Supreme Court of Oklahoma until September 28, 1915 (printed R., 1). This was four months after John L. Bird ceased to be administrator, and at a time when W. O. Dildine had been the administrator for four months. The administrator was a necessary party to the appeal, because it was from a judgment approving his report of receipts and disbursements, and ordering distribution of the estate in his hands by which he was bound, and would be bound by the decision on appeal if changed or modified. Dildine, the administrator, was not made a party in the State Supreme Court nor here, by reason whereof State Supreme Court acquired no jurisdiction. On this question the jurisdiction of this court depends on the jurisdiction of State Supreme Court, and this court is therefore without jurisdiction. We filed a motion to dismiss on this ground in the State Supreme Court (printed R., 147). Counsel for respondent, Laban Miles, does not represent either the respondent Bird, or the administrator Dildine.

Respectfully submitted,

H. P. WHITE,
*Pawhuska, Oklahoma,*
*Attorney for Respondent, Laban Miles.*

# KENNY *v.* MILES ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 179. Argued January 24, 1919.—Decided May 19, 1919.

Subject to the provisions as to certificates of competency, lands allotted as homestead and surplus respectively, under the Act of June 28, 1906, c. 3572, 34 Stat. 539, in the right of a deceased Indian member of the Osage tribe, duly enrolled, and descending to Indian heirs, likewise members duly enrolled, are subject to the same restrictions on alienation as are imposed upon lands allotted to living members. P. 63. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432; *Mullen* v. *United States*, 224 U. S. 448; and *Skelton* v. *Dill*, 235 U. S. 206, distinguished.

Section 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, provides that "the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior." *Held:* (1) That the term "restricted lands" refers to the restrictions on alienation imposed by Congress to protect the Indians from their own incompetency, (p. 61); and (2) that, in the absence of approval by the Secretary, a judgment for partition or sale, in a suit brought under this section in the state court respecting such lands, is inoperative, so that a finding of heirship, forming a part of it, is not conclusive in other proceedings. P. 65.

162 Pac. Rep. 775, reversed.

58. Opinion of the Court.

THE case is stated in the opinion.

*The Solicitor General*, with whom *Mr. Assistant Attorney General Kearful* was on the brief, for petitioner.

*Mr. H. P. White* for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In concluding a proceeding in the county court of Osage County, Oklahoma, for the settlement of the estate of Lah-tah-sah, a deceased Indian woman, it became necessary to determine who were her heirs. Two claimants appeared and sought to establish such a relation. One, John Kenny, claimed to be a son and the sole heir; and the other, Laban Miles, claimed to be the surviving husband and an equal heir with Kenny. It was conceded that Kenny was a son, but it was disputed that Miles ever was the deceased's husband. If he was such when she died, he and Kenny were equal heirs; otherwise Kenny was the sole heir.

At the hearing in that proceeding Miles produced and relied on a judgment in a partition suit, which he had brought against Kenny in the district court of the same county, wherein it was found that he and the deceased were married about a year before her death and that he remained her husband until she died. Over Kenny's protest, based on congressional enactments presently to be noticed, the county court treated that judgment as a conclusive determination of the matters so found and rejected evidence produced by Kenny to show that there had been no such marriage. It was accordingly adjudged that Miles and Kenny were equal heirs, and that decision was affirmed by the Supreme Court of the State. 162 Pac. Rep. 775. The case is here on writ of certiorari.

Whether, consistently with the congressional enactments on which Kenny's protest was based, the judgment in the partition suit could be treated as conclusive of the matters therein found is the ultimate federal question in the case.

Lah-tah-sah was an Indian of the Osage tribe, duly enrolled as such. This entitled her to share in the division and allotment of the lands and funds of the tribe under the Act of June 28, 1906, c. 3572, 34 Stat. 539. She died intestate August 19, 1908. Thereafter two tribal deeds naming her as grantee,[1] and approved by the Secretary of the Interior, were issued under that act. The deeds were for lands allotted to her or in her right out of the tribal lands. One was for 160 acres designated as a homestead, and the other was for 500.12 acres designated as surplus lands. Both purported to pass a title in fee simple, subject to the conditions, limitations and provisions of the act. It was to these lands that the judgment in the partition suit related. That judgment treated the lands as inherited from Lah-tah-sah and ordered that they be partitioned equally between Miles and Kenny as her heirs, or, if not susceptible of partition in kind, that they be sold with a view to an equal division of the proceeds.

By § 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, which is supplementary to and amendatory of the Act of 1906, it is provided that "the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior." It was after this enactment that the partition suit was

[1] As to the legal effect of the deeds issued to her after her death, see besides § 6 of the Act of 1906, Rev. Stats. § 2448; *Crews* v. *Burcham*, 1 Black, 352, 356; *United States* v. *Chase*, 245 U. S. 89, 101.

begun, and there was here no approval by the Secretary of the Interior.

Kenny's protest was based on the Acts of 1906 and 1912 and was to the effect that the lands to which the partition suit related were restricted lands and that in consequence the judgment for their partition or sale was of no effect in the absence of the prescribed approval by the Secretary of the Interior.

The term "restricted lands" in § 6 of the Act of 1912 means lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own incompetency. This is shown by a later sentence in the same section and by various provisions in the Act of 1906.

To determine whether the lands ordered to be partitioned or sold were restricted requires some consideration of the Act of 1906, for it was under that act that they were allotted and the tribal deeds issued. By its first section the act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material here, the authentic roll of the members for the purposes of the act. By its second section it provides that the tribal lands, with stated exceptions, shall be divided among the members in such way as to give each a fair share in acres; that every member "shown by the roll" shall be permitted to select three tracts of 160 acres each; that after all have made the three selections the remaining lands, with some exceptions, shall be divided as equally as practicable by a designated commission, and that—

"Fourth. . . . Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead,[1] and his certificate of allotment and deed shall designate the same as a homestead, and the same

[1] A subsequent joint resolution permitted the homestead to be designated from lands in any one or more of the three selections. February 27, 1909, 35 Stat. 1167.